

No. 89-1158

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1989

MERCEDEL W. MILES, INDIVIDUALLY AND AS
ADMINISTRATRIX OF THE SUCCESSION OF
LUDWICK ADAM TORREGANO

Petitioner,

versus

APEX MARINE CORPORATION, WESTCHESTER
MARINE SHIPPING COMPANY, INC., ARCHON
MARINE COMPANY AND AERON MARINE COMPANY

Respondent.

On Writ Of Certiorari To The United States Court
Of Appeals For The Fifth Circuit

BRIEF ON THE MERITS ON BEHALF OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

- 1) Whether an estate, under a general maritime survival action, is entitled to the decedent's future economic loss?
- 2) Whether the parents of a deceased seaman must establish financial dependency before asserting a claim for loss of society under the general maritime law?

PARTIES TO THE PROCEEDINGS

- 1) Mercedel W. Miles, Administratrix of the Succession of Ludwick A. Torregano (Claims on behalf of Mercedel W. Miles and Joseph Torregano, Sr.)
- 2) Apex Marine Corporation
- 3) Westchester Marine Shipping, Inc.
- 4) Archon Marine Company
- 5) Aeron Marine Company
- 6) Seafarers International Union, Atlantic, Gulf, Lakes, and Inland Waters District, AFL-CIO

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CITATION TO OPINION OF FIFTH CIRCUIT

The opinion of the Court of Appeals for the Fifth Circuit is reported at 882 F. 2d 976.

JURISDICTION

This court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The judgment of a panel of the United States Court of Appeals for the Fifth Circuit was entered on September 11, 1989. A petition for rehearing was denied on October 11, 1989. A petition for a Writ of Certiorari was filed on January 8, 1990. Certiorari was granted on February 26, 1990.

STATEMENT OF THE CASE AND FACTS

On July 18, 1984, Ludwick A. Torregano, a seaman, was stabbed to death on board the vessel, M/V AR-CHON, while it was moored in the Port of Vancouver, State of Washington. The decedent had been stabbed 62 times by a fellow crew member, Clifford A. Melrose. Mercedel W. Miles, mother of the decedent, and administratrix of his estate, brought an action against the vessel owner, charterer, and operator for negligence under the Jones Act, 46 U.S.C. § 688(a), and for unseaworthiness under the general maritime law. The perpetrator of the assault was also named as a defendant, but was not subject to the jurisdiction of the Federal District Court for the Eastern District of Louisiana. (A direct and third

party claim was made against the Union that provided the offending seaman to the vessel, Seafarers International Union, Atlantic, Gulf, Lakes, and Inland Waters District, AFL-CIO. These claims were dismissed by the lower court prior to trial.)

In the trial court the jury found for defendants on the unseaworthiness claim and for the mother on the Jones Act negligence claim. The mother was found by the jury *not* to be financially dependent upon her son. (J.A. 12) The claim of the father, Joseph Torregano, for his son's loss of society, was dismissed by the trial court on a directed verdict since there was no evidence that he was financially dependent upon his son. (J.A. 8 and 15-16). Neither was therefore entitled to loss of society damages. Finally, the trial court denied Miles' claim for the estate's economic loss despite the holding in *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987). (Record, Trial Transcript, Vol. III, pp. 304-306).

An appeal was taken and a decision rendered by the Court of Appeals, Fifth Circuit on September 11, 1989 holding the following:

(1) As a matter of law, given the viciousness of the attack, the offending crew member failed to measure up to the standard of his calling and thus rendered the vessel unseaworthy, *Boudoin v. Lykes Brothers Steamship Company*, 348 U.S. 336 (1955).

(2) The general maritime law does not permit a survival action for a decedent's future wage loss despite a direct contradictory holding of the Court of Appeals for the Ninth Circuit in *Evich*, *supra*.

(3) In a general maritime wrongful death action parents cannot recover damages for their son's loss of society even when he dies without a spouse or child, unless they can establish financial dependency.

The Court of Appeal also reversed the jury's finding that the decedent was 7% contributorily negligent and upheld the trial court's dismissal of petitioner's claim for punitive damages. (Finally, the trial court's dismissal of the claim against the union for allegedly failing to warn the ship owner of the crew member's violent propensities was reversed.)

The Fifth Circuit in its opinion was confronted with "two questions of first impression for this circuit concerning the proper scope of damages under the general maritime law. May the deceased's estate bring a survival action for the recovery of the victim's future economic loss? In a wrongful death action, may the nondependent parents of a deceased seaman, survived by neither spouse nor child, recover for loss of society?" *Miles v. Melrose*, 882 F.2d 976 at 985 (5th Cir. 1989). The Court answered "No" to both questions.

ESTATE'S CLAIM FOR ECONOMIC LOSS

The Fifth Circuit noted the distinction between a survival action and a wrongful death action. In a survival action, the estate or successors of a deceased person are allowed to prosecute a claim for personal injury that the deceased himself would have had but for his death. In a wrongful death action, the victim's dependents, not the victim, are allowed to recover for the harms they personally suffered as a result of the death, independent of any action the decedent may have had for his own personal injuries. 882 F.2d at 985. The court pointed out that the "Supreme Court has not yet recognized a cause of action

for survival benefits under general maritime law." 882 F.2d at 986. However, numerous circuit courts have established a general maritime law survival action claim for a victim's pre-death pain and suffering. 882 F.2d at 986, n. 30.

Petitioner as administratrix of the estate asserted at trial a survival action claim for the decedent's lost future income based upon *Evich v. Morris*, 819 F.2d 256 (9th Cir.), cert. denied, 484 U.S. 914 (1987). That case allowed the estate of a deceased seaman to bring a cause of action, when there are no dependents, for the decedent's lost future income.

In *Evich v. Connolly*, 759 F. 2d 1432 (9th Cir. 1985), (*Evich I*), the nondependent brothers of a deceased seaman brought suit as representative of their brother's estate under the Jones Act and the general maritime law. Both survival and wrongful death damages were sought.

The *Evich I* court held that the nondependent siblings had no cause of action under the Jones Act, 46 U.S.C. § 688(a). The statute by reference makes applicable the provisions of the Federal Employers Liability Act (FELA) 45 U.S.C. § 51 et seq. The persons allowed to claim damages under that section include "the surviving widow or husband and children of such employees; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee." 45 U.S.C. § 51. Since none of the brothers were dependent on the decedent they had no claim.

The *Evich I* court also rejected the siblings' claim for wrongful death under the general maritime law, as recognized in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375

(1970). In the court's view they did not fall within the class of beneficiaries intended to benefit from that cause of action. The court analogized to the Death on the High Seas Act (DOHSA) 46 U.S.C. § 761. Pursuant to that statute an action may be brought only for the benefit of the decedent's "wife, husband, parent, child, or dependent relative." A sibling could bring an action only upon proof of dependency. *Evich v. Connolly*, 759 F.2d 1432 at 1433. Finally, the *Evich I* court held that the estate could maintain a survival action and remanded on that issue. 759 F.2d at 1434.

On remand the district court awarded survival damages only for the decedent's pain and suffering prior to death. In *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987) (*Evich II*) the court held that the decedent's estate should be compensated for loss of future earnings. The Court stated as follows:

While the majority of states do not allow future economic loss to be recovered in survival actions, and the Jones Act provides for no such recovery, we find recovery here " 'better becomes the humane and liberal character of proceedings in admiralty' ", *Moragne* 398 U.S. at 387, 90 S.Ct. at 1780 (citation omitted), and prevents the anomaly of rewarding a petitioner for killing his victim rather than injuring him, see *id.* at 395, 90 S.Ct. at 1784. Most states and the Jones Act allow these damages to be recovered in the form of loss of support when wrongful death beneficiaries exist. Where, as here, those beneficiaries do not exist, potential problems with double recovery do not exist. Under these circumstances, the decedent's estate should be compensated for loss of future earnings. See

Kriesak v. Crowe, 36 F. Supp. 127, 129, (M.D. Pa. 1940).

Evich v. Morris, 819 F.2d at 258.

In the present case the father and mother are in the same situation as the brothers in *Evich II*, *id.* Neither was dependent upon their son. The trial Judge rejected the father's claim because there was absolutely no evidence of monetary benefit from the decedent and the jury rejected the mother's claim holding that any money or services given to the mother did not rise to the level of dependency. (J.A. 8 and 12).

The Fifth Circuit was "not persuaded that the reasons advanced in *Evich* support recognizing an additional basis for recovery." It felt that it was not licensed to create causes of action. (Though it did in the same opinion establish a cause of action against a union on a "failure to warn" theory.) Moreover, "*Moragne* did not recognize a maritime cause of action for wrongful death merely because it was humane to do so. Rather, it recognized the wrongful death action within the context of an almost universal rejection of the common law rule barring such actions." *Miles*, 882 F.2d 976 at 986.

The Fifth Circuit believed that the court in *Moragne* was strongly influenced by legislative acts that had created a cause of action for wrongful death. Quoting from *Moragne* the Fifth Circuit felt that the legislative policy established through the passage of wrongful death statutes has "become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law." *Miles*,

882 F.2d 976 at 987 citing *Moragne*, 398 U.S. at 390-91.

The Court went on to note that "most states survival statutes and the Jones Act do not allow recovery for lost wages" and that "DOHSA gives no action for any kind of survivorship benefit." 882 F.2d at 987. "Furthermore, since Jones Act survival claims do not extend to the decedent's lost wages, uniformity of maritime law is not served by allowing such an action under the general maritime law." 882 F.2d at 987.

The court held that a survival action for a decedent's lost future wages is not permitted under the general maritime law. 882 F.2d at 987.

LOSS OF SOCIETY CLAIMS OF NONDEPENDENT PARENTS

Mercedel W. Miles, as administratrix of the succession of the decedent, asserted a claim for loss of society damages on behalf of herself and Joseph Torregano, the decedent's father. The evidence at trial clearly established that the father did not receive any financial support from his son. None was needed by the father. (R., Tr. Vol. II., pp. 221-222). At the close of plaintiff's case the court granted the defense Motion to Strike the Claim of Joseph Torregano for loss of society since there was no financial dependency. (J.A. 8). The claim of the mother for loss of society damages was submitted to the jury. The jury found that Mrs. Miles was not dependent upon her son at the time of his death. (J.A. 12). It did award the sum of \$7,800.00 under the Jones Act claim for loss of services and support. (J.A. 11-12).

Miles contended in the court of appeal that in a wrongful death action under the general maritime law the nondependent parents of a deceased seaman may recover for loss of society when there is no surviving spouse or child. The court, despite Miles's appeal as administratrix of the succession, held that Joseph Torregano had not filed a notice of appeal and that his claim was not before the court. *Miles v. Melrose*, 882 F. 2d at 987.

The court noted that in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) this Honorable Court recognized a claim for wrongful death under the general maritime law. In *Sea-Land Services, Inc. v. Gaudet*, 414 U. S. 573 (1974) this Honorable Court held that a surviving spouse had a claim for loss of society damages. Society was defined as that "broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection." *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. at 585.

The Fifth Circuit traced its own jurisprudence and noted that the issue raised "is one of first impression for this circuit." In *Sistrunk v. Circle Bar Drilling Company*, 770 F.2d 455 (5th Cir. 1985), cert. denied, 475 U.S. 1019 (1986), the court held that nondependent parents of seamen, who were killed in territorial waters and who were survived by spouses and/or children could not recover for loss of society. The court felt its decision was directed by the "twin aims of maritime law that informed the creation of the wrongful death action in *Moragne*: achieving

uniformity in the exercise of admiralty jurisdiction and providing special solicitude to seaman." 882 F.2d at 987.

The Fifth Circuit concluded first, that "'denial of recovery lends more uniformity to admiralty jurisdiction than allowing recovery,' because the parents could not recover loss of society damages under either the DOHSA or the Jones Act" and secondly, that "providing for the special solicitude of seaman, would not be furthered in any meaningful way by allowing nondependent parents to recover for loss of society." 882 F.2d at 988. The court went on to explain that it could not provide the survivors of a seaman "peace of mind" because the admiralty jurisdiction made distinctions between deaths occurring on the high seas and in territorial waters and those deaths resulting from negligence as opposed to unseaworthiness. "Admiralty cannot provide the parents solicitude at a voyage's outset when their right to recover for loss of society is dependent on the fortuity that the deaths occur in territorial waters and are caused by unseaworthiness." 882 F.2d at 988, citing from *Sistrunk*, supra at 460. Moreover, since the parents were nondependents and the Jones Act and DOHSA do not allow for recovery of non-economic damages, "we do not contravene maritime law's aim of providing special solicitude to seaman by denying them recovery for loss of society." 882 F. 2d at 988.

It appears that the Court is saying that since there is a lack of consistency and non-uniformity in this area and because other recovery is limited, special solicitude cannot be provided.

The Fifth Circuit then made it clear that a policy decision must be made in order to establish a cut off point for those persons claiming damages for their loss of society as a result of a seaman's death. The Court believed that the Supreme Court had suggested a line in *Moragne and Gaudet*, "the line between dependents and nondependents." The Court felt that this line " 'appears to be the most rational, efficient, and fair.' *Truehart v. Blandon*, 672 F. Supp. 929, 938 (E.D. La. 1987). It creates a finite, determinable class of beneficiaries." 882 F. 2d at 989.

The Court realized that its decision "may seem unwarranted" in view of the fact that loss of society damages, a non financial loss, were being restricted to dependents alone. On the other hand the court was concerned with "the number of plaintiffs who could allege a loss of love and affection as a result of the death of a dearly beloved seaman - aunts and uncles, nieces and nephews, even friends and lovers - necessitates that we draw a line between those who may recover for loss of society and those who may not." 882 F. 2d at 989.

The Court apparently believed that allowing nondependent parents recovery for loss of their son's society would help create a "larger and more amorphous" class of plaintiffs. Accordingly, the Fifth Circuit held "that in a general maritime wrongful death action nondependant parents may not recover for loss of society whether or not their deceased children were survived by spouse or child." 882 F. 2d at 989.

Petitioner sought review of the Fifth Circuit's decision because she was denied rights granted to nondependents in the Ninth Circuit and because she believes the admiralty jurisdiction provides a mother and father a claim for loss of society without having to establish dependency.

SUMMARY OF ARGUMENT

I.

In *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987) cert. denied, 484 U.S. 914, the court was presented with the wrongful death of a seaman survived by nondependent siblings. Since neither the Jones Act, DOHSA, or the general maritime law would allow recovery under a wrongful death cause of action, the court recognized a survival cause of action for the estate's economic loss. The court believed that this was in line with "the humane and liberal character of proceedings in admiralty" and "prevents the anomaly of rewarding a [defendant] for killing his victim rather than injuring him". *Evich*, 819 F.2d at 258. The holding of the Fifth Circuit in the case at bar dispenses with any effective legal remedy for the wrongful death of a seaman, who is survived by nondependents. If death befalls the seaman instantaneously there is no recovery. By following *Evich*, a more humane remedy is made available. Petitioner respectfully submits that allowing an estate under a survival action to claim a decedent's economic loss is consistent with a number of state survival statutes and better serves the interest of seamen.

II.

In the case at bar, the Court of Appeals for the Fifth Circuit denied to parents of a deceased seaman any claim for loss of society damages because they were not financially dependent upon their son. The Jones Act and DOHSA, relied upon by this Honorable Court in recognizing a cause of action for wrongful death, do not require dependency on the part of parents before a claim can be asserted. Dependency applies only to "next of kin" (Jones Act) or "relatives" (DOHSA). Loss of society damages are not financially based and should not hinge upon a parents financial dependency, especially where there are no surviving minor children and/or spouse. To so hold is more in line with the humane and generous nature of the admiralty law.

 ARGUMENT

I.

 THE ESTATE'S CLAIM FOR LOSS OF
FUTURE EARNINGS

The United States Court of Appeals for the Ninth Circuit has held that where dependents do not exist a "decedent's estate should be compensated for loss of future earnings." *Evich v. Morris*, 819 F.2d 256 at 258 (9th Cir. 1987), cert. denied, 484 U.S. 914 (1987). Mercedel Miles, as administratrix of the succession of her deceased son, sought survival action damages in the district court. The trial judge declined to follow the Ninth Circuit's holding in *Evich*, id., and dismissed the claim. (J.A. 8).

The Fifth Circuit on appeal concluded "that the general maritime law does not permit a survival action for the deceased's lost future wages." *Miles v. Melrose*, 882 F.2d 976 at 987 (5th Cir. 1989). Petitioner respectfully submits that the holding in *Evich* is in harmony with the humane and generous purposes of the general maritime law and should be followed.

The *Evich* decision must be considered within the context of the status afforded seamen in the admiralty courts. Seamen are declared to be the "wards of admiralty." *Robertson v. Baldwin*, 165 U.S. 275 (1897). They are provided "a special solicitude", *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) and when examining a cause of action it is better "to give than to withhold the remedy." *American Export Lines v. Alvez*, 446 U.S. 274, 281-82 (1980).

Equally significant to the Court in *Evich*, was the prevention of "the anomaly of rewarding" an employer "for killing his victim rather than injuring him." 819 F.2d at 258. The *Evich* court believed that the Supreme Court was attempting to do the same in *Moragne*, in overruling *The Harrisburg*, 119 U.S. 199 (1886). But see *Complaint of Cambria Steamship Company*, 505 F. 2d 517 (6th Cir. 1974) cert. denied, 420 U.S. 975.

The Harrisburg was a death without a remedy. In this case, had Torregano's death been immediate and less gruesome, there would have been a similar result. The same thing occurred in *Neal v. Barisich, Inc.*, 707 F.Supp. 862 (E.D. La. 1989). In that case a seaman was knocked overboard as a result of a collision between two vessels. Since the parents were not dependent, there was no claim

for loss of society. Since there was no evidence of pain and suffering prior to death, there were no damages. Finally, since there was no recognized claim for the estate's economic damages, there was no recovery. If this is the law, then the spirit of *The Harrisburg* survives, despite the stated purpose of *Moragne*.

As the law now stands in the Fifth Circuit, nondependent survivors of a seaman have no claim except for what pain and suffering can be shown prior to death. If death befalls such a seaman instantaneously, it is a legal non-event.

The jurisprudence is not without precedent in allowing survival damages. First, admiralty courts recognize a claim for pain and suffering. "After *Moragne* . . . numerous decisions of [the Fifth] and other circuits have recognized that, under the principals announced in that decision, the general maritime law includes a survival action permitting recovery for the victim's pre-death pain and suffering." *Miles*, supra, 882 F.2d at 986, citing *Azzopardi v. Ocean Drilling and Exploration Company*, 742 F.2d 890, 893 (5th Cir. 1984); *Law v. Sea Drilling Corporation*, 523 F.2d 793, 795 (5th Cir. 1975); *Barbe v. Drummond*, 507 F.2d 794, 799-800 (1st Cir. 1974); *Spiller v. Lowe*, 466 F.2d 903, 909 (8th Cir. 1972). Most states provide for a survival cause of action for pre-death losses. *S. Speiser, Recovery for Wrongful Death*, 2d Ed. (1975), Vol. I., § 1:23 at p. 56. Additionally "[t]he Federal Employers' Liability Act, 45 U.S.C. § 59, and the Jones Act, 46 U.S.C. § 688, but not the Death on the High Seas Act, 46 U.S.C. § 761-768, contain survival provisions." *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 at 576, n.2 (1974).

The issue is not whether a survival action exists, but the extent to which damages are allowed. The question here is whether future economic losses of a decedent's estate are a recoverable element of damages under the general maritime law. The *Evich* holding in this regard does not stand alone. State survival statutes and the maritime law also have allowed such damages.

In *Muirhead v. Pacific Inland Navigation, Inc.*, 378 F.Supp. 361 (W.D. Wash. 1974) the court allowed recovery for an estate's future economic loss. It felt that such a holding was consistent with *Moragne*, supra, and *Gaudet*, supra, and the Washington State Survival Statute, R.C.W. 4.20.046. The Court recognized such a cause of action in the general maritime law and awarded \$10,000.00. Interestingly, Torregano met his death in the State of Washington. See also, *Dugas v. National Aircraft Corp.*, 438 F.2d 1386 (3d Cir. 1971) and *United States v. Texas Co.*, 272 F.2d 711 (4th Cir. 1959), applying state survival statutes.

In *Evich* the court acknowledged that an estate's economic losses were not generally recoverable under state survival statutes. A review of *Speiser, Recovery for Wrongful Death*, 2d Ed. (1975) would reflect that a determination of the exact number of states that allow such a recovery is not easily derived. There is no uniformity in wrongful death or survival statutes. *Speiser*, § 15.1, p. 459. For example, some states provide that damages are to be awarded to certain beneficiaries for their pecuniary loss. However, in those states, if there are no designated beneficiaries then the estate has a claim for its economic losses. See *Speiser*, § 3:1, p. 104, n.4. No doubt the concern of the authors of such legislation is with circumstances where the decedent is survived by nondependents. Such

a statute "prevents the anomaly" referred to in *Evich*. 819 F.2d at 258.

In the Fifth Circuit the defendants argued that allowing an estate to recover its economic losses would result in a double recovery. A particular concern was the fact that Mrs. Miles recovered \$7,800.00 for loss of support and services under the Jones Act. A simple offset would be the appropriate method of dealing with this supposed problem. See *Speiser*, supra, § 14:2, p. 411. See also *Gaudet*, 414 U. S. 573 at 593-596, where the Court was faced with previously awarded loss of future income.

Methods of determining the economic loss to an estate vary. According to *Speiser*, supra, the "most prevalent theory is that the damages should represent the present value of the decedent's probable future net earnings. In other words, the recovery should equal the decedent's probable future earnings, diminished by the amount he would have spent for his own living expenses had he survived, and reduced to present value." *Speiser*, supra, § 3:2, p. 122. Additional methods include measuring the damages "by the present worth of decedent's probable gross earnings" and "by the present worth of decedent's probable future accumulations." *Speiser*, supra, § 3:2, pp. 122-126. Regardless of the measure of damages, it is respectfully submitted that states with such survival statutes take a more humane and generous view in situations where the decedent dies without dependents and/or beneficiaries. A wrongful death without a remedy is simply not allowed to occur.

Judge Rubin of the Fifth Circuit believed that courts were not licensed "to create causes of action whenever

they see fit." 882 F. 2d 976 at 986. Yet, in the same opinion that court recognized for the first time a "failure to warn" cause of action by a shipowner against a union. 882 F.2d 976 at 991-992. Moreover, it is unfair to say the Ninth Circuit has "created" a cause of action when so many jurisdictions provide for it. See *Speiser*, supra, § 3:1, p. 104-107, n. 4 reference to the statutes of the states of Alaska, Delaware, Indiana, Pennsylvania, Arizona, Florida, Georgia, Mississippi, and New Mexico.

Judge Rubin's view that "[t]he recognition of an estate's survival action for lost wages would stand alone", 882 F.2d at 987, is not entirely correct, considering the states that do in fact provide for this element of damages. A similar result in the case at bar would seem consistent with the "solicitude" and the giving of the "remedy" contemplated in *Moragne*. Moreover, any concern with uniformity in the admiralty law is addressed by providing for this recovery only in cases where there are no dependent beneficiaries.

Petitioner respectfully submits that survival actions do exist that provide for economic damages to an estate, especially in those cases where the decedent dies without dependents. Given the humane and generous character of the admiralty law, such damages should be allowed.

II.

PARENT'S CLAIM FOR LOSS OF SOCIETY DAMAGES

This Honorable Court unanimously held in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) "that an

action does lie under general maritime law for death caused by violation of maritime duties." *id.* at 410. The Court believed that the rule of *The Harrisburg*, 119 U.S. 199 (1886), denying a remedy for wrongful death under the general maritime law, had to be overruled in view of the outdated common law principals upon which *The Harrisburg* was based, the universal existence of wrongful-death statutes, *Moragne*, *supra* at 390-391, and the promotion of uniformity in the maritime law, *Moragne*, *supra* at 402.

The *Moragne* court recognized that elements of this cause of action would have to be addressed in subsequent decisions. This included the "determination of the beneficiaries who are entitled to recover" and "questions of the measure of damages." *id.* at 407. The parties before the Court suggested the Death on the High Seas Act, 46 U.S.C. § 761, § 762, the Jones Act, 46 U.S.C. § 688 (see 45 U.S.C. § 51) and the Longshoreman and Harbor Workers' Compensation Act, 33 U.S.C. § 909 as guides. The Court chose not to "determine this issue now, for we think its final resolution should await further sifting through the lower courts in future litigation." These issues were "grist for the judicial mill." *Moragne*, *supra* at 409.

In *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974) this Honorable Court recognized under the general maritime law a claim for loss of society, that "broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection." *id.* at 586.

Historically the Court noted that many "early wrongful-death statutes were interpreted by courts to preclude recovery for loss of society damages" and limited recovery to "pecuniary loss." *id.* at 587. "A clear majority of states, on the other hand, have rejected such a narrow view of damages, and, either by expressed statutory provision or by judicial construction, permit recovery for loss of society." The Court further referenced the statement of *Speiser*, *supra*, that "the recent trend is unmistakably in favor of permitting such recovery." *id.* at 588, *S. Speiser, Recovery for Wrongful Death* (1966). Finally, the Court felt its decision was "compelled if we are to shape the remedy to comport with the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction." *id.* at 589.

The claimants before the court in both *Moragne*, *supra*, and *Gaudet*, *supra*, were the wives of deceased longshoremen. Both were obviously dependent upon their husbands. The court referred to these claimants as "dependents." For example, in *Gaudet*, the Court stated: "Unquestionably, the deprivation of [loss of society] by wrongful death is a grave loss to the decedent's dependents." *id.* at 586-587.

In deciding upon the class of beneficiaries entitled to loss of society damages some courts have taken the use of the term "dependents" as a directive by this Honorable Court to limit those damages to a decedent's financial dependents. This literal interpretation was made despite the specific holding that the issue required "further sifting" through the lower courts. *Moragne*, *supra* at 409. The

Fifth Circuit in *Miles* was of the belief that the Supreme Court in *Moragne* and *Gaudet* had suggested "the line between dependents and nondependents." *Miles v. Melrose*, 882 F.2d 976 at 989 (5th Cir. 1989). See also *Sistrunk v. Circle Bar Drilling Company*, 770 F.2d 455 (5th Cir. 1985), cert. denied, 475 U.S. 1019 (1986) *Complaint of DFDS Seaways (Bahamas Ltd.)*, 684 F. Supp. 1160 (S.D.N.Y. 1987), *Truehart v. Blandon*, 672 F.Supp. 929, 938 (E.D.La. 1987), and *Neal v. Barisich, Inc.*, 707 F. Supp. 862, (E.D. La. 1989).

In *Sistrunk*, supra, a case relied upon in *Miles*, the court was faced with the claims of parents of a decedent who was survived by a spouse and/or children. In *Sistrunk*, the court believed that uniformity could not be obtained because the parents in that case had no cause of action under the Jones Act and no recovery under DOHSA, because of non dependency and this court's holding in *Mobile Oil Corporation v. Higginbotham*, 436 U.S. 618 (1978). See also, *Complaint of DFDS Seaways*, 684 F.Supp. 1160 (S.D.N.Y. 1987). Nor could special solicitude be provided to the seaman because the parents were not financial dependents and because recovery "for loss of society is dependent on the fortuity that the deaths occur in territorial waters and are caused by unseaworthiness." 770 F.2d at 460. Finally, the court in *Sistrunk* looked to state wrongful death statutes and found that "the vast majority of states do not provide parents *similarly situated* to those in this case the right to recover for loss of society." 770 F.2d at 460 (emphasis supplied). Practically every state statute referenced denied loss of society damages to parents when the decedent was survived by a spouse and/or children. 770 F.2d at 460, see n. 5.

It is respectfully submitted that the Courts in *Sistrunk* and *Miles* were seeking "consistency" of remedies and not "uniformity"; something impossible to achieve in admiralty given the distinction between the damages and beneficiaries under DOHSA and the Jones Act and the damages under general maritime law. Moreover, the problem in *Sistrunk* was with priority and ranking. A child and/or spouse has preference over a parent in a wrongful death claim for loss of society damages. State legislatures have drawn a line at that point. In the case at bar, the decedent was not survived by a spouse or child. In *Truehart*, supra, and *Neal*, supra, as well as in the instant case, the court was presented with a decedent survived by parents alone. There is no issue of priority or ranking or the number of persons seeking damages in *Miles*.

Judge Alvin B. Rubin in *Miles* stated that denying nondependent parents loss of society damages was appropriate because it was more in line with the twin aims of maritime law. The Court believed that "denial of recovery lends more uniformity to admiralty jurisdiction than allowing recovery" and the provision of "special solicitude of a seaman, would not be furthered in any meaningful way by allowing nondependent parents to recover for loss of society." *Miles*, 882 at 988, citing *Sistrunk v. Circle Bar Drilling Company*, 770 F.2d 455 (5th Cir. 1985), cert. denied, 475 U.S. 1019 (1986).

Interestingly, when Judge Rubin was faced with this exact issue when he was a district court judge he held otherwise. In *Hamilton v. Canal Barge Company, Inc.*, 395 F.

Supp. 978 (E.D. La. 1975) the court was presented with the claims of a posthumous child, nondependent parents and decedent's intended wife. The child and parents were allowed recovery. Judge Rubin in analyzing *Moragne* and *Gaudet*, stated as follows:

In *Gaudet*, the court said, "the decedent's dependents may recover damages for their loss of support, services, and society," 94 S.Ct.at 814 (emphasis supplied), making no mention of the right of nondependent relatives to recover. Under neither the Jones Act nor DOHSA, however, is dependency required by a parent to recover. In *re Risdal & Anderson*, D. Mass. 1968, 291 F.Supp. 353. This is the clear intent of both statutes, which, in listing beneficiaries, modify only "relatives" (DOHSA) or "next of kin" (Jones Act) with the adjective "dependent." Dependency is not a prerequisite to recovery by parents in Louisiana, La. Civ. Code Art. 2315, nor in most other states. W. Prosser, Law of Torts § 127 (4th Ed. 1970). It would therefore seem untoward to read a dependency requirement into the *Moragne* action for wrongful death.

Judge Rubin there recognized that when Congress established a line at "dependency" in wrongful death statutes it did so *after* parents. He also recognized that the use of the term "dependents" was not controlling. More importantly it was not a prerequisite for recovery in "most . . . states." This is the same backdrop that Judge Rubin recognized had compelled the Supreme Court to create a wrongful death cause of action - the already existing federal and state statutes. This legislative policy is "a part of our law, to be given its appropriate weight" in the Court's decision. *Miles*, 882 F.2d 976, 987. Yet recovery was denied by the Fifth Circuit in *Miles*.

Judge Rubin in *Miles* also made the point that "special solicitude" could not be provided because distinctions are made in admiralty law in death cases between those occurring on the high seas and territorial waters and deaths resulting from negligence as opposed to unseaworthiness. Petitioner respectfully suggests that the "special solicitude" requirement should not be abandoned merely because different remedies apply under different circumstances. Moreover, the court's statement that "denial of recovery lends more uniformity . . . because the parents could not recover loss of society damages under either the DOHSA or the Jones Act", 882 F.2d at 988, is inapposite, because a wife and/or minor child can not recover such damages under those Acts either.

It is respectfully submitted that the aim of achieving uniformity is directed to making one body of law applicable throughout the United States. It would be futile to seek consistency in this area given the non-existence of a loss of society claim on the high seas, *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618 and the judicial limitation of the Jones Act to pecuniary damages, *Michigan Central Railroad v. Vreeland*, 277 U.S. 59 (1913). The difference between actions arising on territorial waters and on the high seas and under the Jones Act and under general maritime law are based upon the historical development of the law. In a sense, they are inconsistencies "coextensive with, and operating uniformly in the whole country." *The Lottawanna*, 21 Wall. 558, 575 (1875).

In *Miles*, Judge Rubin, as organ for the court, believed that allowing recovery to non dependent parents

would assist in creating a "larger and more amorphous" class of beneficiaries.

The number of plaintiffs who could allege a loss of love and affection as a result of the death of a dearly beloved seaman – aunts and uncles, nieces and nephews, even friends and lovers – necessitates that we draw a line between those who may recover for loss of society and those who may not. The line suggested by the Supreme Court in *Moragne* and *Gaudet*, and by our own court in *Sistrunk*, the line between dependents and nondependents, 'appears to be the most rational, efficient and fair.' *Truehart v. Blandon*, 672 F. Supp. 929, 938 (E.D. La. 1987). It creates a finite, determinable class of beneficiaries.

Miles v. Melrose, 882 F. 2d at 988-989.

In the Ninth Circuit the question of "dependency" and loss of society is apparently not an issue. In *Cook v. Ross Island Sand and Gravel Company*, 626 F.2d 746 (9th Cir. 1980) the court had before it a claim for the death of a seaman who was survived by a mother and other family members. The jury awarded damages for the decedent's pain and suffering prior to death and for "deprivation of (decedent's) comfort, care, aid and society" (i.e. loss of society). The jury awarded nothing for the loss of support to the decedent's mother. This was of no concern to the reviewing court. "Based on the allegation of unseaworthiness, plaintiff was entitled to recover damages for the loss of the decedent's society, pursuant to the principals of general maritime law set forth in *Moragne* and *Gaudet*." 626 F.2d 746 at 753. Moreover, other district courts have allowed this element of damages post *Moragne* and *Gaudet*. See *Thompson v. Offshore Company*, 440 F.Supp.

752 (S.D. Tex. 1977), where the court felt that "it would be inappropriate to conclusively presume that only the financially dependent suffer a loss of society." 440 F.Supp. at 765. See also *Complaint of Metcalf*, 530 F.Supp. 446 (S.D. Tex. 1981) where the court held that a decedent's mother suffered a loss of society regardless of dependency. 530 F.Supp. at 461. In *Palmer v. Ribax, Inc.*, 407 F.Supp. 974 (M.D. Fla. 1976) the court was of the belief that each family member had a claim for loss of society and that non-dependents should not be foreclosed from recovery. 407 F.Supp. at 979. See also *Hamilton v. Canal Barge Company, Inc.*, 395 F.Supp. 978 (E.D. La. 1975).

Even the Fifth Circuit in *Skidmore v. Grueninger*, 506 F.2d 716 (5th Cir. 1975), post *Gaudet*, held that "survivors in a maritime wrongful death action may be allowed recovery for loss of support, services, society and funeral expenses." 506 F.2d at 728. (emphasis supplied). The decedent in *Skidmore* was survived by a spouse, minor children, and an adult daughter. There was no mention whatsoever with the latter's dependency. "In permitting this recovery we recognize that an adult offspring is within the class of plaintiffs intended to be vindicated in maritime wrongful death actions." 506 F.2d at 728, n. 11. But see, *Miles*, 882 F.2d at 987 and *Neal v. Barisich, Inc.*, 707 F.Supp. 862 (E.D. La. 1989).

Utilizing dependency to control who can and cannot recover damages for loss of society creates its own inherent problems and injustices. In *Wade v. Rogala*, 270 F.2d 280 (3rd Cir. 1959), a Jones Act claim on behalf of a surviving father, the court believed that "it is only necessary to establish that [the father] had a reasonable expectation of pecuniary benefit from the continued life of his

son" in order to maintain a claim for pecuniary damages. In *Matter of P & E Boat Rentals, Inc.*, 872 F.2d 642 (5th Cir. 1989) the court referred to the Longshore and Harbor Workers' Compensation Act which provides that dependency is established "[w]here the contributions are made for the purpose and have the result of maintaining or helping to maintain the dependent in his customary standard of living." 872 F.2d at 649. More than likely, courts will utilize various definitions of dependency. It can range from an expected dependency in the future to present financial assistance to true financial dependency at the time of death.

A dependency criteria would also expand and open up the number of persons who could make a claim. For example, in *Complaint of Patton-Tully Transportation Company*, 797 F.2d 206 (5th Cir. 1986) the lower court awarded damages to a surviving mother and brothers and sisters of the decedent. The court held that "all dependents" may recover such damages. Since the decedent contributed to the family household his siblings were entitled to loss of society damages. Depending on its holding, this Honorable Court may find it necessary to address the issue of whether or not the ranking of beneficiaries is necessary. See ranking under Jones Act, 46 U.S.C. § 688(a), applying FELA, 45 U.S.C. § 51, as to non-ranking under DOHSA, 46 U.S.C. § 761.

In *Miles* the court was concerned with "the number of plaintiffs who could allege a loss of love and affection as a result of the death of a dearly beloved seaman - aunts and uncles, nieces and nephews, even friends and lovers . . ." 882 F.2d at 989. As the law now stands should

any of a decedent's aunts and uncles, nieces and nephews, and even friends and lovers be dependent upon that person at the time of death they would have a claim for loss of society damages. In contrast, parents who do not require and in fact may reject financial support from their child are denied this most basic and appropriate element of damages as for wrongful death.

When considering the proof required to establish financial dependency as compared to establishing a blood or adoptive relationship between a parent and child, the latter is obviously easier for a jury to comprehend and understand and is not subject to speculation or interpretation. There is no need for a jury to examine a check book in order to understand a parent/child relationship. Cases may differ as to the quality and constancy of that relationship, but certainly not the reality of its existence.

The holding in *Miles* is of little consequence to a decedent's wife or child. It is of great significance to parents and adult children, who are usually not dependent upon the decedent. In cases of short term suffering before death, or in instantaneous death, the result is a significant loss without a remedy. See *Neal v. Barisich, Inc.*, 707 F.Supp. 862 (E.D. La. 1989). For all practical purposes, petitioner's recovery in this case was based solely upon the gruesome nature of her son's death. Maritime death claims do not normally occur in such a fashion, and but for that happenstance, the case at hand would also have had no remedy.

Loss of society damages are not financially based. It should therefore not be subject to a financial determinative when dealing with so basic a relationship as parent

to child. Petitioner is not before this Honorable Court asserting damages for aunts, uncles, friends or lovers. It is not suggested that all familiar persons are entitled to this element of damages. Petitioner simply asserts that in this case the loss is real and measurable, and should be recognized. Proper limits can be imposed as later cases "sift" through the courts.

In the end, a line must be drawn. The most reasonable line is the one drawn by Congress in the Jones Act, and in DOHSA, which do not require parents to show financial dependency. If there must be a line of dependency, then it should be drawn *after* parents and not before.

The Death on the High Seas Act states in pertinent part as follows, 46 U.S.C. § 761: "the personal representative of the decedent may maintain a suit for damages . . . for the exclusive benefit of the decedent's wife, husband, parent, child, or *dependent* relative against the vessel, person, or corporation which would have been liable if death had not ensued." The Jones Act, 46 U.S.C. § 688 (a) applying 45 U.S.C. § 51 (FELA): "every common carrier . . . shall be liable in damages . . . in case of the death of such employee to his or her personal representative, for the benefit of the surviving widow or husband and children of such employees; and, if none, then of such employee's parents; and, if none, then of the next of kin *dependent* upon such employee." (emphasis supplied) (See Appendix for full text.)

A subsidiary issue that petitioner respectfully submits this court should address is the statement of the Fifth Circuit that the father, Joseph Torregano, was not

before the court because he did not appeal in his individual capacity. The issue is whether or not it is necessary for him to do so, given the fact that the representative of the succession asserted a claim on his behalf at trial. In *Futch v. Midland Enterprises, Inc.*, 471 F.2d 1195 (5th Cir. 1973), the court held that consistent with DOHSA, the Jones Act, and the Longshoreman and Harbor Workers' Compensation Act, "the personal representative or legal representative of the decedent" is the proper party to bring the wrongful death action under the general maritime law. The law would take a strange twist if each claimant had to file a separate appeal, despite the fact that they could not file an original claim in the lower court.

CONCLUSION

Petitioner respectfully prays that the decision of the Court of Appeal for the Fifth Circuit denying the claim for the estate's economic damages and denying the damage claims of the parents for loss of society be reversed, and that the case be remanded for further proceedings consistent with the directives of this Honorable Court.

Respectfully submitted,

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APPENDIX

46 U.S.C. § 761 et. seq.

DEATH ON HIGH SEAS BY
WRONGFUL ACT

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

46 U.S.C. § 688

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees

shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. —————

45. U.S.C. § 51 et seq.

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

* * *

§ 59. Survival of right of action of person injured

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

from in front of "next of kin" to in front of "wife, husband, parent, child" in DOHSA, 46 U.S.C. §761 and from in front of "relatives" in FELA to in front of "surviving widow or husband and children . . . ; and, if none, then of such employee's parents . . ." 45 U.S.C. §51 (Jones Act, 46 U.S.C. §688(a)).

The shipowner for its position can only refer to how many times this Court used the term "dependents." It cannot state that this Court made that specific determination and ignores the dissent in *Gaudet* which recognized that "the Court has still not resolved . . . how to define the class of beneficiaries . . ." *Gaudet*, 414 U.S., at 602.

While petitioner has no statistics on this point, it is obvious that many seamen are young and unmarried. Death of these individuals in many cases will result in no damages. *Neal v. Barisich, Inc.*, 707 F. Supp. 862 (E.D. La. 1989). This chilling result is not limited to seamen, since the same principles would apply to the death of a bright college student or young professional in a pleasure boating accident. *Truehart v. Blandon*, 672 F. Supp. 929 (E.D. La. 1987). The spirit of the general maritime law is not so harsh.

3) Uniformity and Special Solitude to Seamen Would Not be Served by Limiting Recovery of Loss of Society Damages Solely to Dependents.

It is the parents in this case who are seeking consistency by utilizing the same beneficiaries set out in DOHSA and the Jones Act as the beneficiaries who should be entitled to loss of society damages under *Gaudet*. Such a holding would result in a consistency of beneficiaries between a general maritime law wrongful death claim within territorial waters and under the Jones Act. Damages would not be consistent given the difference in damages allowed under the different statutory schemes involved in death cases.

The shipowner relies upon the lower court's proposition "that 'denial of recovery lends more uniformity to admiralty jurisdiction than allowing recovery,' because the parent could not recover loss-of-society damages under either the DOHSA or the Jones Act." *Miles*, 882 F.2d at 988. The reliance is inappropriate. Neither can wives, husbands, or children recover non-pecuniary damages under those statutes. Moreover, the Fifth Circuit in *Dennis v. Central Gulf Steamship Corp.*, 453 F.2d 137 (5th Cir. 1972) at 140, addressed the issue of "uniformity" in the admiralty law when it stated:

The 'uniformity' that is fundamental in maritime law has to do with the bases of liability, not with differing elements of damages that may be recoverable in differing circumstances with differing classes of beneficiaries.

Respondents also contend that "special solicitude" cannot be shown to deceased seamen by allowing their parents to recover loss of society damages. Special solicitude is shown by allowing those seamen who pay the ultimate price of their employment a right of recovery for the actual damages sustained by those close to them, here parents. Even *Vreeland*, which limited a railroad worker's recovery to monetary damages, recognized that loss of society damages were real. *Vreeland*, 227 U.S., at 71. See also *Gaudet*, 414 U.S., at 585-590 and 587 n. 21.

Respondent contends that the line drawn between dependents and non-dependents "appears to be the most rational, efficient and fair" [citing *Truehart v. Blandon*, supra]. It creates a finite, determinable, class of beneficiaries." *Miles*, 882 F.2d, at 988-989. Petitioner submits that it is not the most rational, efficient and fair method of drawing a line. A blood or adoptive relationship of a parent to child is exceedingly more understood by a jury of laymen than an analysis of financial contributions to persons who may or may not be related. These damages

should not turn upon check book entries. Loss of society speaks directly to the relationship of a parent to a child. The loss is real and palpable. Parents should not be relegated to an inferior status because no or not enough money exchanged hands. Such an inquiry may be appropriate for the "next of kin," it certainly is not one that should control when it comes to parents.

CONCLUSION

Petitioner respectfully submits that the Jones Act did not statutorily preempt for seamen the general maritime law death remedies and damages recognized by this Honorable Court. Further, it would be appropriate under the circumstances to recognize a general maritime survival action claim for the economic losses of the decedent's estate, given the fact that no one was dependent upon the decedent at the time of his death. Finally, petitioner prays that loss of society damages should be allowed for non-dependent parents in view of the classes of beneficiaries set forth in the Federal Employers Liability Act, 45 U.S.C. §51 (Jones Act, 46 U.S.C. §688(a)) and the Death on the High Seas Act, 46 U.S.C. §761.

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